No. 80-877

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,

*Petitioners,*

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## QUESTION PRESENTED

Whether the granting of a Church's petition to sell real property without an evidentiary hearing, on papers containing material factual issues, deprives formally objecting parishioners of liberty and property without due process in violation of the Fourteenth Amendment to the United States Constitution?

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SUPREME COURT OF THE UNITED STATES

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The petitioners, Stephen Hopkins and Douglas D. Donald, pray that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York rendered in these proceedings on August 29, 1980.

## OPINIONS BELOW

This case arose in the Supreme Court of the State of New York, County of New York. A copy of the opinion of Justice Alfred M. Ascione of that Court dated October 17, 1979, is annexed hereto as Appendix A (pp. A1-A23). It has not been reported. An order was entered on November 13, 1979, a copy whereof is annexed as Appendix B (pp. A24-A33). The decision of the Supreme Court was affirmed unanimously by the Appellate Division First Department on the opinion of Justice Ascione on March 25, 1980. The New York Court of Appeals dismissed Petitioner's appeal by order dated May 29, 1980, a copy of which is annexed hereto as Appendix C (pp. A34-A35), N.Y.2d , N.Y.S.2d . That Court denied

Petitioners' request for leave to appeal by order dated August 29, 1980, a copy of which is annexed hereto as Exhibit D (pg. A36), N.Y.2d , N.Y.S.2d .

Petitioners applied to the Supreme Court of New York County to vacate judgment on the ground of newly discovered evidence which motion was denied by order dated July 8, 1980. Said decision was affirmed by the Appellate Division First Department on November 18, 1980. Copies of the orders on the motion to vacate are annexed hereto as Appendices E and F respectively (pp. A37-A44 and A45-A46).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1: "...[N]or shall any state deprive any person of life, liberty or property with due process of law...."

Constitution of the United States, Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

## STATUTORY PROVISIONS INVOLVED

Religious Corporations Law §13(1), 50 McKinney's Consol. L. Supp. 14:

> "1. A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court therefor pursuant to

section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (c) of subsection one of section two-b of this chapter...."

Not-for-Profit Corporations Law §§511(b) and (d), 37 McKinney's Consol. L. 156, Supp. 31:

"(b)...Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

"(d) If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such considertaion and upon such terms as the court may prescribe...."

Estate, Powers and Trusts Law §8-1.1(c), 17B McKinney's Consol. L.

334:

> "(c) The supreme court... [has] jurisdiction over dispositions referred to and authorized by paragraphs (a) and (b) [pertaining to religious and charitable dispositions], and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained herein ...."

## STATEMENT OF FACTS

This is a proceeding commenced by Respondent Church (the "Church") for

judicial permission to sell its Memorial House (a parish social facility) and a small apartment house containing the Church's Thift Shop on the ground floor. Such permission is required under New York's Religious Corporations Law §12.

Pursuant to New York's Not-for-Profit Corporations Law §511(b), Petitioners intervened and objected to the sale. Petitioners are long-standing members of the Church. They are also experts in financial matters. Stephen Hopkins is a financial writer and editor and an investment advisor and manager. Douglas D. Donald is vice president -- research of Scudder, Stevens & Clark, investment counselors.

The relevant statutes require the making of several factual determina-

tions before the Church may be permitted to sell:

First, it must "appear to the satisfaction of the court, that the consideration and terms of the transaction are fair and reasonable" to the Church. N-PCL §511(d).

Second, it must "appear, to the satisfaction of the court, ... that the purposes of the [Church] or the interests of the members will be promoted" by the sale. N-PCL §511(d).

Third, inasmuch as both properties were donated to the Church with restrictions affecting the Church's right to dispose of them, reformation of the deeds is required under the cy pres doctrine. Under the applicable statutory provision, a finding must be made that circumstances have so changed

since the donation "as to render impracticable or impossible literal compliance with the terms" of the donation. EPTL §8-1.1(c).

As will appear further below, the evidence on all three of these issues was contradictory and presented clear issues of material fact. Indeed, the Judge at Special Term* particularly observed in his opinion that Petitioners here "have made an extensive analysis of the financial and economic data submitted by [the Church] in support of its application...[and] take sharp issue with [the Church's] interpretation of such data." (A11-A12). Nevertheless, Special Term granted the

*The motion part of the Supreme Court, New York County.

Church's petition without an evidentiary hearing and without permitting Petitioners here the opportunity for discovery which they had requested.

The two properties in question were donated to the Church in 1888 by John Pierpont Morgan and his wife, who for many years were premier sources of financial support to St. George's Church.* The Morgans directed that Memorial House be used for parish activities such as Sunday school, clubs, reading rooms and gymnasiums. Until some time after Special Term rendered its decision, Memorial House in fact housed the Church's pre-school (known as the Jack and Jill School) as well as

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*St. George's is one of the component parishes of the Church having been consolidated with two other parishes in 1975.

being used by the YMCA and other organizations. The Morgans directed in the deed to the apartment house (which was donated simultaneously) that income from its operation be utilized to support Memorial House. The Morgans prohibited the sale of Memorial House except under circumstances not relevant to this case.

In support of its petition to sell, the Church presented an appraisal of the two properties, financial statements of the Church going back several years, unaudited financial statements pertaining to the two properties, breakdowns of the Church's endowment portfolios, and analyses of such information by Vestry members having professional background in finance and real estate.

Petitioners, not being officers of the Church and having no independent access to Church records, analyzed the data presented by the Church, added some conflicting data of which Petitioners were aware, and requested an opportunity for discovery. The discovery request was implicitly denied in the decision of Special Term underlying this appeal.

Although in a disadvantageous position to do so, Petitioners were able to demonstrate the existence of significant factual issues, stemming in large part from internal contradictions within the Church's own evidence. The expert analyses of the available evidence on both sides also presented material factual issues necessitating opportunity for cross-examination to

test the validity of the conflicting expert views.

The following are some of the more important factual issues appearing from the record:

a. Sufficiency of the Church's Income to Cover Expenses:

The Church claims that its income is insufficient to cover current expenses. For 1979 it projected a deficit of $119,800. However, its entire endowment is invested so as, in the words of the Church's spokesman, to "maintain an aggressive investment posture with concentration on active small energy company equities" yielding a minimal dividend return. The Church's financial spokesman claimed that only actual dividend income should be taken into account in computing the

Church's operating income. Petitioner's financial expert contended that such an investment and accounting policy distorts reality and that proper accounting would call for allocating capital appreciation, to the extent of an assumed yield of approximately 10%, to income in order to present a valid financial picture. If this were done, the Church would have a projected operating surplus of $46,900 for 1979 rather than the projected deficit of $119,800.*

*Under New York Law differences of opinion between experts on issues requiring expert analysis in themselves constitute triable issues of fact. Brooklyn Union Gas Co. v. Cashmore, 4 N.Y.2d 727, 171 N.Y.S.2d 115 (1957). See also Matter of Westchester Elec. R. Co. v. City of Mt. Vernon, 237 N.Y. 199 (1924), holding that a trial is necessary if the issues involve subjective interpretation of facts.

Unaudited financial statements for the year ended December 31, 1979 were made available in February, after Special Term had rendered its decision. These indicated that the Church's endowment had increased by a staggering $1,400,000 from $1,032,696 at the beginning of the year to approximately $2,440,000 at year's end. Thus a proper allocation of investment appreciation between income and capital would have produced an even greater operating profit than Petitioners had projected on the basis of information the Church had made available to Special Term. Petitioners sought unsuccessfully to vacate the original judgment on the basis of this newly discovered evidence. (See A 37-A 46).

b. Value of Memorial House:

The Church's appraisal report arbitrarily assumes a land value of $35 per square foot although the comparable sales cited in the report itself show land values averaging $41.50 per square foot for land along Third Avenue (in the zone in which part of the Memorial House property lies) and $38.67 per square foot for side streets (in the zone in which the balance of the Memorial House property lies). Applying the latter figures, one calculates a land value from $30,000 to $54,000 higher than the $515,000 price concluded by the Church's appraiser.

c. Value of 175 Third Avenue:

The Church has sought to justify its disposition of the income producing apartment house (175 Third Avenue) by

claiming that the building is worthless and "could not be given away, much less sold for any substantial sum". The Church then contradicts this conclusion by mentioning that it has received an all cash offer of $140,000 for that property.

d. The Church's need for Memorial House:

The Church claims that Memorial House serves no useful purpose to the Church. Nevertheless, the evidence shows that as recently as 1975 or 1976, Memorial House was heavily utilized for Parish activities such as offices for the Rector and assistant Rector, a Sunday School, meeting rooms and dining rooms, benefits, charity sales, gymnasium, scouting, arts & craft classes, hobby clubs, dancing classes, and other

such uses. At the time the Church's petition was filed, approximately 25% of the space in Memorial House was utilized for the Church's Jack and Jill School. Petitioners argued that this valuable outreach program, which tends to draw new membership to the Church, was seriously jeopardized by the proposed sale of Memorial House. The Church proposed that, upon sale, it would move the School, which occupied some 15,300 square feet in Memorial House, into an adjacent building which contains a total of only 11,400 square feet,

A study by Peat, Marwick, Mitchell & Co. procured by Petitioner Hopkins after Special Term had rendered its decision, establishes that there remains a strong community need for the

facilities of Memorial House and that the two buildings together could, under proper management, be operated at a net profit of some $46,500 per year. Petitioners have sought to make this report part of the record through their motion to vacate judgment.

e. Loss of YMCA as Tenant of Memorial House:

In the last few years, the YMCA has rented a major portion of Memorial House to operate a gymnasium in what the Church has characterized as a joint program. The Church justified its proposal to sell Memorial House in part on the basis of the claim that the YMCA had notified the Church of its intention to terminate its program at Memorial House, thus demonstrating the alleged uselessness of that facility.

Petitioners pointed out to Special Term that the Church had failed to indicate whether the YMCA would stay on if encouraged to do so and Petitioners further suggested, in view of the Church's desire to sell, that any encouragement from the Church would have been in the opposite direction. Petitioners noted that the YMCA had in fact remained past the expiration of its lease -- a fact indicative of its desire to say. Some eight months after Special Term's decision, the director of the YMCA program at Memorial House came forward to Petitioners and informed them that the YMCA had been asked by the Church to leave and would not have left had it not been for this eviction. Again, Petitioners have unsuccessfully sought to make this in-

formation part of the record through the motion to vacate judgment.

f. Operating Results of 175 Third Avenue:

The Church has claimed that the rental income of 175 Third Avenue does not cover its operating costs, even though the building is fully occupied by rent-paying tenants except for a portion of the ground floor occupied by St. George's Thrift Shop. The Church later admitted that it attributed no income to one store occupied by the Thrift Shop, nor to "seven apartments... utilized by Parish staff who render consideration largely in terms of services other than cash." In an operating statement annexed to the Church's spokesman's statement, she claimed an operating loss of $7,717 for 1977 and $4,587 for 1978. But

schedules annexed to the Church's appraisal report show net income of $14,570 per year, a return of 11% on appraised value. Further descrepancies reveal that this net income should be about $18,000 per year on the basis of currently available rents for unrented space. Furthermore, contrary to the figures contained in the unaudited statements referred to above, the audited financials showed a loss of $4,981 (rather than $7,717) for 1977, and a profit of $3,428 for 1978.

g. Repairs Needed for 175 Third Avenue:

The Church claimed that this building is in need of "major repair work" which could well consume from $50,000 to $75,000. The Church offered no probative evidence, however, of what repairs are required nor of their

projected costs. Belying the Church's conjectures regarding "major repairs" is the appraiser's report produced by the Church and the report of the New York City Department of Rent and Housing Maintenance, both showing extremely minor maintenance requirements. The appraiser, for example, noted that only the following conditions require repair (indicating those requiring "early consideration" with an asterisk):

1. Vestibules and halls need painting.

*2. Tile wainscot in vestibule needs repairing.

*3. Linoleum stair covering should be replaced.

*4. Remove debris from basement.

h. Possible Conflicts of Interests:

Petitioners contended that certain statements by the Church's spokes-

men indicated possible conflicts of interest which required opportunity for cross-examination so that their implications could be assessed. Specifically, Mrs. Emily Flynn, whose affidavits on behalf of the Church were addressed to real estate operations, noted that she is a "former professional real estate consultant to the Parish" and among the reasons that "the Parish has been favorably disposed" toward the proposed purchasers is that the latter have "arranged financing from banking institutions known to the Parish". The first point raises questions as to whether Mrs. Flynn has any professional relationship to the proposed sale. The second is curious in view of the fact that the proposed sale is an all cash transaction; one

would expect that, absent a conflict of interest, the Church would be utterly disinterested in what banks the buyer is borrowing from. We note, however, that the Church's spokesman on financial matters in this proceeding is an officer of Irving Trust Company.

RAISING OF FEDERAL QUESTIONS

The constitutional issue presented here was first raised on the appeal to the Appellate Division from Special Term's granting of the petition to sell. (Brief for Objectants-Appellants to Appellate Division, pg. 19). It was not raised at Special Term because, until the right to a hearing had been denied, no constitutional issue existed.

## REASONS FOR GRANTING THE WRIT

### A. This Court Has Not Previously Established Standards for Determining When the Granting of Summary Judgment, Despite the Presence of Material Issues of Fact, Violates the Due Process Clause

This Court has occasionally addressed the question of whether summary judgment, in the abstract, is constitutional, and has determined, in cases where no issues of fact were raised, that a trial, whether by a jury or by the court, is not constitutionally required. See e.g. Fidelity and Deposit Co. v. United States, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902). We have not, however, found any case in which this Court has directly passed upon the question of whether a litigant is denied due process if summary judgment is rendered against him, without

his having had an opportunity to confront and cross-examine adverse witnesses, despite the demonstrated presence of material issues of fact. Indeed, although this constitutional issue is obviously important, we have found little authority on it in the decisions of other courts.

One hardly need belabor the importance of the constitutional issue. It is a truism that the right to confront and cross-examine witnesses in a judicial proceeding affecting substantial rights is central to the concept of due process. E.g. Alford v. United States, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 24 (1931) ("Cross-examination of a witness is a matter of right."); Calhoun v. Cook, 487 F.2d 680 (5th Cir. 1973); Matter of Hecht v.

Monaghan, 307 N.Y. 461 (1954). See Societe Intern. v. Rogers, 357 U.S. 197, 78 S.Ct. 1076, 2 L.Ed.2d 1255 (1958) (dismissing for failure to comply with discovery order); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (striking answer for contempt).

It would follow that if, on a motion for summary judgment, a material issue of fact is raised in a credible manner, a factual hearing is required in order to provide the opportunity for confrontation and cross-examination of witnesses. Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405 (N.D.N.Y. 1973) (holding that summary judgment is constitutionally unavailable in a proceeding challenging the validity of patents where conflicting expert views

were presented). See Calhoun v. Cook, supra, 487 F.2d at 683, holding that a compromise school integration plan may not be adopted without an evidentiary hearing as "minimum procedural due process requires adequate notice of hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views." Cf. Diamond v. Davis, 38 N.Y.S.2d 103 (N.Y. Co. 1942, n.o.r.), aff'd. without op. 292 N.Y. 552 (1944), holding that a motion for summary judgment, properly granted, does not unlawfully deprive a losing party of the right to trial; and Oglesby v. Terminal Transport Co., 543 F.2d 1111 (5th Cir. 1976) to same effect.

Nevertheless, as noted before, we find no direct authority on this issue emanating from this Court. Indeed, the pronouncements of this Court and others to the effect that summary judgment is constitutional in the abstract may tend to mislead those not carefully analyzing the facts of those cases to believe that such a general statement is true even where material issues of fact have been raised.

The dismissal of Petitioners' appeal as of right to the New York State Court of Appeals on the ground that Petitioners had failed to raise a substantial constitutional question illustrates the need for guidance from this Court to establish that the improper granting of summary judgment

does indeed have constitutional ramifications.

B. The Decision Below Is Not In Accord With The Law

In Sartor v. Arkansas Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L.Ed. 967 (1944), this Court considered the appropriateness of granting summary judgment under circumstances remarkably similar to those presented here. As in the present case, the evidence presented on behalf of the moving party was largely presented by witnesses who were related to the moving party and thus interested, and consisted of expert opinion on a financial issue. The opponent rested on an analysis of the proponent's evidence and upon a showing that it was inconsistent in part with a jury finding in a previous trial, much

as Petitioners here show internal inconsistencies in the Church's evidence. The Court in Sartor held that expert testimony is, by its nature, subject to disbelief by a jury and is therefore not a proper predicate for summary judgment, and that this is particularly true where the proponent's witnesses are interested in the outcome. The Court, therefore, reversed the grant of summary judgment.*

*In Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Court made the following comments interpreting Rule 56 (but without reference to the due process clause):

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present

Footnote continued on page 33.

Sartor, being a case which rose through the federal courts, was decided solely under Rule 56. We have found no cases in which the Court has had to apply the constitutional standards because, as here, a state court determination was involved. We submit, however, that the cases cited above regarding the right to confront and cross-examine witnesses necessarily imply that summary judgment may not be granted consistent with due process,

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Footnote continued from Page 32.

and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

where material issues of fact have been raised and the proceeding affects a substantial right. Moreover, as indicated above, lower courts have on occasion expressly ruled that summary judgment is precluded by the due process clause where there are material issues of fact. Johnson Foils, Inc. v. Huyck Corp., supra, Calhoun v. Cook, supra. Cf. Diamond v. Davis, supra. Thus the decision below is inconsistent with applicable law including applicable decisions of this Court.

The failure below to grant Petitioners' request for dicovery reinforces the constitutional necessity of a full hearing. Although the substantive outcome of this case rests largely on an assessment of the

Church's financial stability and the income producing capability of the two properties, the facts bearing on these matters are primarily within the domain of the Church and are accessible to Petitioners only through either discovery or confrontation and cross-examination of the Church's witnesses. With the discovery avenue closed by the courts below, the need for a hearing becomes particularly pressing. See Poller v. Columbia Broadcasting System, Inc., supra, 368 U.S. at 478 (Harlan, J. dissenting).

Petitioners have substantial interests which they have asserted in this litigation and which are protectable by the due process clause of the Fourteenth Amendment. First, the

litigation affects their religious liberty as long-standing members of the Church in that it involves the disposition of properties used by the Church in its broad religious and social mission. See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952). Secondly, N-PCL §511(b), in authorizing church members to intervene and assert their objections to the sale creates a property right protected by the due process clause. See United States v. Standard Oil Co., 21 F. Supp. 645 (S.D. Cal. 1938), aff'd. 107 F.2d 402 (9th Cir. 1939), cert. den. 309 U.S. 654, 673, 60 S.Ct. 469, 715, 84 L.Ed. 1003, 1019 (1940), reh. den. 309 U.S. 697, 60 S.Ct. 706 84 L.Ed. 1037 (1940).

C. This Court Has Granted Certiorari To Consider Similar Issues

It is recognized that this Court may not hear every case in which procedural due process has been denied. However, the Court has exercised its discretion on numerous occasions in the past to reinforce even rather obvious points of procedural due process. For example, in Poller v. Columbia Broadcasting System, Inc., supra, the Court granted certiorari to determine whether summary judgment was properly available where issues of fact were presented "in complex antitrust litigation where... the proof is largely in the hands of the alleged conspirators...." 368 U.S. at 473.

In Sartor v. Arkansas Gas Corp., supra, the Court granted certiorari

because of "the importance of questions raised under the summary judgment rule" where the proponent's evidence was from interested experts.

In Societe Internationale v. Rogers, supra, the Court granted review in order to confirm that precluding parties from presenting their cases in court because of failure to comply with court orders may, under certain circumstances, amount to a denial of due process.

In Alford v. United States, supra, the Court granted certiorari where the issue raised was whether, in a criminal trial, the defendant is entitled to ask a non-party witness, on cross-examination, where the witness resides. In its decision, the Court

confirmed that "Cross-examination of a witness is a matter of right." 282 U.S. at 691.

In Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) the issue presented was whether a party was entitled to a jury trial under the federal Declaratory Judgment Act. The Court granted certiorari because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 359 U.S. at 501, quoting Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 599 (1934).

Similarly, in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), the Court granted certiorari to the Supreme Court of Missouri out of concern that a party had been denied due process "in the primary sense" of having "an opportunity to present its case and be heard in its support." 281 U.S. at 681. In that case, the state courts had reversed a long-standing construction and practice which precluded recourse to an administrative agency and directed the party to exhaust administrative remedies. However, by the time of the decision, the party could no longer have recourse to the administrative agency because of the passage of time. The Court held that the state courts

must hear the case because failure to do so would deprive the party of an opportunity to be heard.

## CONCLUSION

We respectfully submit that this case presents an appropriate opportunity to clarify that the granting of summary judgment on contested facts denies due process, and to correct an injustice in this particular instance.

Dated: New York, New York
November 26, 1980

Respecfully submitted,

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# APPENDIX

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

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The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. Geroge's in the City of New York, :

Petitioner, :

For leave to sell certain of its real property. :

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Index No. 11559/79
No. 42 on Cal. of 8/24/79

ASCIONE, J.:

Motions # 42 and 147 of August 24, 1979 are consolidated for disposition as follows.

Petitioner, the Rector, Churchwardens and Vestrymen of the consolidated Protestant Episcopol Parish of Calvary, Holy Communion and St. George's in the City of New York (the "Parish"), pursuant to Religious Corporations Law § 12 and Not-For-Profit Corporation Law § 511, has filed a

petition which seeks an order authorizing the sale of two parcels of real property owned by the Parish located at 207 East 16th Street (the "Memorial House") and 175 Third Avenue, (the "apartment house"), New York, New York. This court is requested to construe the deeds of the properties sought to be sold to permit the sale.

Subsequent to the filing of the petition, objectants Stephen Hopkins (Motion # 42) and Douglas D. Donald (Motion # 147), alleged to be parishioners of St. George's Church prior to its consolidation with Calvary and Holy Communion in or abourt 1975 and parishioners of the consolidated church since then, have each served and filed objections to the petition, requesting

that it be dismissed and the sale not approved and that the elections of Vestrymen and the subsequent vote approving the sale of the property be declared void. Alternatively, objectants request a hearing.

By cross-motion, petitioner requests an order granting the petition and construing the deeds to permit the sale.

The Attorney General of the State of New York has appeared herein as a respondent pursuant to Article 8 of the Estates, Powers and Trusts Law as the representative of ultimate charitable beneficiaries and consents to the petition approving the sale and releasing the deed restrictions. The Attorney General also waives any hearing in this matter.

Underlying objectants' opposition to the proposed sale is their genuine concern for what is perceived to be a gradual dismantling of the facilities of St. George's Church. "While the dismantling presently involves facilities designed for such church-related activities as a pre-school program, Sunday School, Thrift Shop and social activities, the disappearance of facilities for such activities will tend to threaten the basis of the membership in the church by eliminating activities ancillary to worship." (Affidavit of Stephen Hopkins, sworn to June 29, 1979).

The other objectant, Mr. Donald, stated it this way: "I also particularly concur with Mr. Hopkins' concern that the alienation of the social

facility attached to St. George's - The Memorial House - can only lead, whether intentionally or unintentionally to the withering of St. George's Church." (Affidavit of Douglas D. Donald, sworn to August 17, 1979).

The petition and affidavits in support thereof allege that the properties are not self-sustaining (the deficit for both buildings is said to be about $16,000.00 for the first half of 1979 and that petitioner must utilize funds which could otherwise be used and are need for its other programs, to offset this deficiency. The Parish's total operating deficit for the years 1976 to 1978 was stated to be $500,000.00 (Affidavit of Robert D. Schumacher, sworn to August 6, 1979).

It is further alleged that the properties are in need of major repairs estimated to cost $50,000.00 to $75,000.00 (Affidavit of Emily Flynn, sworn to August 23, 1979).

> "Petitioner's annual income does not adequately cover its current operating expenses. Not only will the sale of these buildings reduce petitioner's deficit, but the proceeds, which shall be applied to petitioner's endowment funds, will generate additional income needed by petitioner to finance its present programs and to support and maintain its other properties." (Petition, dated and acknowledged June 20, 1979, by Rector, Thomas F. Pike, ¶ 9(d)).

In his affidavit in support of the cross-motion and in opposition to the objections, Rev. Thomas F. Pike, who is the Rector of the Parish, reviews the circumstances which led to the consolidation of the three long-established parishes of the Protestant

Episcopal Church in Manhattan, to wit, Calvary, Holy Communion and St. George's.

> "Like most urban religious organizations in recent years, these entities were confronted with sharply rising costs unmatched by comparable increases in membership or income. Accordingly, by 1975, these parishes were suffering continued operating deficits of approximately $345,000.00. Recognizing the futility of continued separate efforts, the parishes thereupon resolved to consolidate in order to seek solutions to these problems on a unified basis."

Rev. Pike avers that the consolidation has been successful from every vantage point, "including that of the ministry."

However, Rev. Pike states, continued operation of the properties sought to be sold by the Parish would impose serious hardships on the Parish and could impair concerted efforts to

attain financial stability. Were the objections upheld, their proponents "would enjoy but a hollow Pyrrhic victory - one which would threaten the continued existence of the entire Parish."

As a result of consolidation, Rev. Pike asserts, the Parish is the owner and operator of thirteen properties, of which twelve are either landmarks or parts of historical districts. According to Rev. Pike, it is the Parish's intention to maintain as many of these properties as its financial abilities will permit, for these buildings are of historical, cultural and esthetic importance to the City, as well as of religious significance to the Parish. But Rev. Pike contends,

the continued operation of the properties sought to be sold would irreparably damage the Parish's ability to maintain any of its facilities, "resulting in precisely the disappearance of worship centers feared by Mr. Hopkins."

Petitioner has received an all-cash offer of the aggregate sum of $636,000.00 for its property, which is stated to be the highest price offered for the property. The properties are appraised for a total value of $650,000.00. It seeks authorization of this sale pursuant to the terms of the contract of sale attached to the petition. After deducting broker's fees and other sale related expenses, the proceeds will be applied to petitioner's endowment funds.

The consents of the Bishop of the Protestant Episcopal Church in the Diocese of New York and the Standing Committee of the Diocese are annexed to the petition. (See Religious Corporations Law § 12).

The relevant statute, Not-For-Profit Corporation Law § 511(a) 6, requires that there be a showing, "that the purposes of the corporation, or the interests of its members will be promoted by the sale..." Subd. (d) provides as relevant that, "If it shall appear, to the satisfaction of the court, that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale ... for such consideration and upon such terms as the court may prescribe..."

Objectants argue that the proposed sale should not be approved as it will not promote the interests of petitioner's members. It is contended that petitioner has failed to prove that its existing endowment is insufficient to support operating expenses nor that the buildings in question are a significant drain on petitioner's resources or that they will require any significant expenditure in the foreseeable future. According to objectants, petitioners must demonstrate that the retention of the properties is "impracticable or impossible", which petitioner has failed to do.

Objectants have made an extensive analysis of the financial and economic data submitted by petitioner

in support of its application. They take sharp issue with petitioner's interpretation of such data. However, after careful review of the data and the arguments of the parties, this court is convinced that retention of the properties is not in the best interests of petitioner and its members. In this court's opinion, the proposed sale is in the best interests of petitioner and its members.

What does emerge from objectants' papers is their continued dissatisfaction with the consolidation of St. George's with Calvary and Holy Communion and their perception of the dismantling of St. George's as a separate entity. Petitioner has satisfactorily demonstrated that objectants' fears in

this regard are unwarranted. But more importantly, consolidation is a reality and objectants' arguments directed against the effects of consolidation are now irrelevant.

The members of St. George's have voted for consolidation with Calvary and Holy Communion, and, in Rev. Pike's words, "[They] elected to participate in the the creation of a new, unified identity drawing its strength from the traditions of each component. Hence, it is the best interests of the Parish as presently constituted which must be taken into account in evaluating the merits of our petition."

Objectants' challenge to the vote of the Vestry approving the sale has been considered and is rejected. Whatever defect there may have been in the

procedure for enlarging the Vestry, from seven Vestrymen and two Churchwardens to twelve Vestrymen plus two Churchwardens, in February 1977, was waived by objectants, in that they participated in the Parish annual meeting approving the resolution to enlarge the Vestry and have voted at subsequent annual meetings since then, without objection, in accordance therewith. (see Mtr. of Hellenic Circ. v. Kotsilimbas, 79 M 2d 675, aff'd 43 AD 2d 672, aff'd 35 N.Y. 2d 814). The failure by the Parish to file the required certificate with the County Clerk of New York County has now been remedied to no one's prejudice. Further, it does not appear that failure to file renders the resolution void.

It is merely voidable. (See Religious Corporations Law § 45).

The only remaining issue relates to the request of petitioner to waive deed restrictions in connection with the sale of the properties. These properties were given to St. George's Parish by John Pierpont Morgan and his wife, Frances Louisa Tracy in 1888.

The deed for the Memorial House, located at 207 East 16th Street, provides in relevant part that the building is to be used by St. George's "exclusively for its parish work that is to say for Sunday and other schools societies clubs or guilds for libraries or reading rooms gymnasiums or dispensaries or other organizations having like objects and purposes which shall be from time to time established by

said corporation...and maintained as a part of its Parish Work and that no parcel or parcels of such buildings shall be leased or rented...but in case of the removal of Saint George's Parish Church from its present location said party of the second part [St. George's] may sell and dispose of said land and the said buildings thereon provided that the entire proceeds of sale thereof be forthwith applied to the acquisition in fee simple of other Real Estate to be devoted to the like use and subject to like power of sale. The intention of the parties hereto being that said land and the buildings thereon or such other or others as may be substituted therefor as hereinbefore provided shall be forever styled and known as St. George's Memorial House in memory

of Charles Tracy and Louisa Kirkland Tracy his wife and remain forever devoted exclusively to the parish work of said party of the second part as herebefore provided."

The deed for the apartment house located at 175 Third Avenue created a trust for the benefit of the widow of the late Rector Stephen H. Tyng, D.D., during her lifetime of the sum of $1,000.00 annually out of the rents from said property. The remainder of the rents was to be applied "to the proper corporate uses and purposes of itself said party of the second part but in case the revenues and income of said party of the second part shall not suffice for the maintenance of its Memorial House a Parish building then

said remainder of said rents is hereby specifically appropriated thereto and with full power and authority to said party of the second part to sell the premises hereby granted and to invest and from time to time to reinvest the proceeds of sale thereof in income producing property real or personal always keeping and retaining the same as a permanent fund the income whereof shall be appropriated as above provided and in case said party to the second part shall itself occupy or use the premises hereby granted or any part thereof for any of its corporate uses or purposes it shall pay an adequate and fair rental therefor to said fund."

Thus, the donors' clearly expressed intent with respect to Memorial House was that it was to be used "ex-

clusively" by St. George's for its parish work and, if sold, the proceeds of sale were to be applied to the purchase of other real property for the same purposes, provided that such other property be forever known as St. George's Memorial House in memory of Charles Tracy and Louisa Kirkland Tracy, Mrs. Morgan's parents.

It is also abundantly clear that the balance of the apartment house rents from the 175 Third Avenue property, after the trust payments to the Rector's widow, now expired, were to be applied to the maintenance of Memorial House if the income of St. George's was not sufficient to maintain Memorial House. Further, St. George's was authorized to sell said property and the proceeds of any such sale were di-

rected to be invested in income producing property, real or personal, for the same purposes.

Due to the change in circumstances since these properties were donated in 1888, over 90 years ago, petitioner's income from these properties is insufficient to maintain them and it has been necessary to fall back on petitioner's endowment and other income to meet these deficits.

Petitioner proposes to deposit the proceeds of the sale of these properties in their endowment fund, which will be suitably invested, to provide additional funds for parish work consistent with the provisions of the deeds. Further, the fund realized from the sale, will be denominated "The Charles Tracy and Louisa Kirkland Tracy

Memorial Fund," and $50,000.00 from this fund will be utilized to renovate petitioner's Pierce House property to accommodate the Parish's pre-school program, The Jack and Jill School, located in the Memorial House.

In addition, the Parish intends to rename its Calvary House facility, "Tracy House."

In these circumstances, the proposed sale, the intended use of the funds obtained from said sale for parish works and the recognition to be afforded to the memory of Mr. and Mrs. Tracy, are all consistent with the charitable intentions of the donors set forth in the conditions and provisions of the deeds to the properties to be sold. (See Estates Powers and Trusts Law § 8-1.1(c)).

Further, in the absence of a showing of bad faith by petition completely lacking here, this court is loathe to interfere with the judgment of petitioner, a religious corporation, that this sale is necessary and in the best interests of its members. This is especially so where there is such unanimity in support thereof by the ecclesiastic and lay leaders of the church as appears in the papers submitted to this court.

Sufficient has been shown in the papers submitted to this court to obviate any necessity for a hearing. The Attorney General, the representative of ultimate charitable beneficiaries, has waived a hearing and requests that this court approve the sale, exercise its cy pres power to remove the deed restric-

tions and to direct the application of the proceeds of sale to petitioner's endowment fund.

Accordingly, the objections are dismissed, the motions to dismiss the petition are denied, the petition is granted in all respects as requested in the cross-motion, the deeds are construed to permit the sale and the net proceeds of sale are directed to be applied to petitioner's endowment fund, to be designated as "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund."

Settle order.

DATED: October 17th, 1979

/s/ AMA
J.S.C.

At a Special Term, Part I of the Supreme Court of the State of New York, County of New York, at the County Courthouse located at 60 Centre Street, New York, New York, on the 13th day of November 1979.

P R E S E N T:

Honorable Alfred M. Ascione,

Justice.

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The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioner,

For leave to sell certain of its real property.

----------X

ORDER

Index No. 11559/79

Petitioner, having petitioned this Court for an Order authorizing the

sale of certain parcels of real property situated at 207 East 16th Street, New York, New York, and 175 Third Avenue, New York, New York (the "Property"), pursuant to the contract of sale annexed to the Petition, and further, for an order authorizing the Petitioner's Rector to execute, acknowledge and deliver on behalf of Petitioner a deed conveying title to the Property, to execute, acknowledge and deliver such other instruments and documents as may be necessary and desirable in connection with the consummation of said sale, and to apply the proceeds of said sale available to Petitioner, after payment of broker's fees and other sales related expenses, to the Petitioner's endowment fund, and,

Objectants, Stephen Hopkins and Douglas D. Donald, having moved by Order to Show Cause dated July 2, 1979 for an Order dismissing the Petition, and,

Petitioner having filed a cross-motion for an Order pursuant to Section 12 of the Religious Corporations Law of the State of New York approving the sale of the Property situated at 175 Third Avenue, New York, New York, and 207 East 16th Street, New York, New York, and construing the deeds of said Properties to permit such sale, and,

Objectants having moved by Order to Show Cause dated August 17, 1979 for an Order declaring the increase in the number of Petitioner's vestry persons and all subsequent elections of such vestry persons to be void, and further,

declaring the action of the Petitioner's vestry in approving the sale of the aforesaid Property to be void,

NOW, upon reading and filing the Petition verified by the Reverend Thomas F. Pike on June 20, 1979, and the exhibits annexed thereto in support of the Petition; and, upon reading and filing the Order to Show Cause signed by Hon. Israel Rubin dated July 2, 1979, the affidavit of Stephen Hopkins sworn to June 29, 1979, the affirmations of Michael Gruen dated June 29 and July 3, 1979, the affidavit of Douglas D. Donald sworn to August 21, 1979, the affidavit of Grace R. Donald sworn to on August 21, 1979, and the affirmation of Michael Gruen dated August 21, 1979, together with all of the exhibits annexed thereto, all in

support of the motion to dismiss the Petition; and upon reading and filing the Order to Show Cause dated August 17, 1979, the affidavit of Douglas D. Donald sworn to August 17, 1979, the affirmation of Michael Gruen dated August 17, 1979, together with the exhibits annexed thereto, all in support of the motion declaring the election of the Petitioner's vestry persons void; and upon reading and filing the Notice of Cross-Motion dated August 10, 1979, the affidavit of James J. Terry sworn to August 8, 1979, the affidavit of Reverend Thomas F. Pike sworn to August 2, 1979, the affidavit of Emily Flynn sworn to August 1, 1979, the affidavit of Robert D. Schumacher sworn to August 6, 1979, the affidavit of Reverend Frederick B. Williams sworn to

July 31, 1979, the affidavit of James J. Terry sworn to August 23, 1979, the affidavit of Robert D. Schumacher sworn to August 24, 1979, the affidavit of Emily Flynn sworn to August 23, 1979, and the affidavit of Reverend Thomas F. Pike sworn to September 5, 1979, together with all of the exhibits annexed thereto, all in support of the Cross-Motion by Petitioner; and upon reading and filing the answer of Robert Abrams, Attorney General of the State of New York, dated August 22, 1979, and the affidavit of Sharon Cuff Slater, Assistant Attorney General, sworn to on August 22, 1979 in support of the Cross-Motion, consenting to the Petition approving the sale and releasing the deed restrictions, and waiving any hearing; and Petitioner having appeared

by Messrs. Cole & Deitz, and objectants having appeared by Michael S. Gruen, and the Attorney General of the State of New York having appeared by Robert Abrams and Sharon Cuff Slater; and upon the Memorandum of this Court dated October 17, 1979,

NOW, on the Motion by Cole & Deitz, counsel for Petitioner, it is

ORDERED, that the Petition and the Cross-Motion by Petitioner are granted, and the Motions brought on by objectants by Orders to Show Cause dated July 2, 1979 and August 17, 1979 are denied in all respects; and it is further,

ORDERED, that the sale of the Property pursuant to the contract of sale annexed to the Petition is authorized, and it is further,

ORDERED, that for the purpose of carrying the sale into effect, Petitioner's Rector is authorized and empowered on behalf of Petitioner to execute, acknowledge and deliver a deed conveying title to the Property, and to execute, acknowledge and deliver such other instruments and documents as he and counsel to Petitioner may determine necessary or desirable in connection with the consummation of said sale, and it is further,

ORDERED, that the deeds of the aforesaid Property are reformed and construed so as to permit the sale of the Property in accordance with the contract of sale annexed to the Petition; and it is further,

ORDERED, that the Petitioner deposit the proceeds of said sale

available to it after payment of broker's fees and other related expenses, in an endowment fund, to be denominated "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund", to be used in connection with parish work consistent with the provisions of the deeds on the aforesaid Property, and it is further,

ORDERED that $50,000 from the aforesaid endowment fund be utilized to renovate Petitioner's Pierce House property to accommodate Petitioner's preschool program; and it is further,

ORDERED, that the Petitioner rename its Calvary House facility, "Tracy House"; and it is further

ORDERED that no party shall have costs or disbursements against any other party.

E N T E R.

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FILED
November 13, 1979
New York Co.
Clerk's Office

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of May A.D. 1980

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

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1 Mo. No. 613 SSD 61

In the Matter of The Rector, &c. of the Parish of Calvary, Holy Communion and St. George's &c.,

Respondent,

Stephen Hopkins &ano.,

Appellants,

Attorney General of the State of New York,

Respondent.

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The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without

costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

1 Mo. No. 760
In the Matter of
The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York, Respondent,
For leave to sell certain real property,

Motion, insofar as it seeks to leave to appeal from the Appellate Division order denying appellants' motion to enlarge the record, dismissed upon the ground that said order does not finally determine the proceeding within the meaning of the Constitution; motion for leave to appeal otherwise denied.

DECISION COURT OF APPEALS AUG 29 1980

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

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THE RECTOR, CHURCHWARDENS and VESTRYMEN of the PARISH OF CALVARY, HOLY COMMUNION and ST. GEORGE'S IN the CITY of NEW YORK,

Petitioner,

For leave to sell certain of its real property,

Stephen Hopkins and Douglas D. Donald,

Objectants,

ATTORNEY GENERAL of the STATE of NEW YORK,

Respondent.

----------X

Index No. 11559/79

No. 122 on Cal of
July 1, 1980

ASCIONE, J.:

Motion by objectants, in this proceeding for leave to sell church property, for an order, pursuant to

CPLR 5015, vacating the prior order of this court dated and entered on November 13, 1979, on the grounds of newly discovered evidence, which prior order granted the petition and approved the sale on certain conditions, is denied.

By order dated March 25, 1980, the Appellate Division, First Department, unanimously affirmed the order dated November 13, 1979. On the same date, the Appellate Division denied objectant motion to enlarge the record on appeal to include some of the matters presented on the instant motion. By order dated May 29, 1980, the Court of Appeals sua sponte dismissed objectants' appeal, as of right, based upon alleged constitutional questions, "upon the ground that no substantial constitutional question is directly involved."

Presently pending is objectants' motion for leave to appeal to the Court of Appeals.

It appears that the property in question is to be sold pursuant to said order, at a closing now scheduled for August 15, 1980. Originally, this closing was set for December 30, 1979.

In essence, objectants' motion is premised on an unsworn report by a respected accounting firm commissioned by one of the objectants on March 6, 1980 and delivered on May 27, 1980, both dates long after this court's opinion and order herein. The report (Exhibit A to the moving affidavit of objectant Douglas D. Donald, sworn to June 20, 1980), concludes with this statement:

> "We believe that there is enough potential revenue that might be generated by the two properties

> to justify deferral of the sale and reconsideration of the Parish's commitment to fully utilize the two facilities."

Again, in a letter dated July 1, 1980 (Exhibit A to the reply affidavit of objectant Stephen D. Hopkins, sworn to July 1, 1980), the author of the report Robert W. Lee, comments on the statements contained in petitioner's opposing affidavits, and concludes:

> "Finally, the use of the conditional tense in stating that 'there is enough potential revenue that might be generated by the two properties to justify deferral of the sale...' is common sense in that no one could realistically and unequivocably state what will happen in the future."

These unsworn statements by objectant's expert demonstrate the futility of objectants' arguments. Firstly, no plausible explanation is given for objectants' failure to submit

expert opinion at a much earlier time in support of their contention that there were reasonable and viable alternatives to the proposed sale. Only after this court's order was unanimously affirmed on appeal was such expert opinion obtained.

But, more importantly, the report is only an optimist's appraisal of hoped-for results which can hardly form the basis for an economic decision of such far reaching implications to petitioner. That the deficit operation of these properties by petitioner has been a drain on petitioner's endowment fund is not and cannot be denied.

The total Parish net operating deficit for 1979 was $137,500, and the operating deficit for the first five months of 1980 is $156,300., a signi-

ficant consideration in petitioner's decision to dispose of these properties, which have contributed to the deficit.

While it is true that the value of petitioner's endowment has increased remarkably in the last year, due to the exceptional performance of the oil stocks in the Parish's investment portfolio, such a fortuitous circumstance is hardly a sufficient reason for ignoring the impact of the deficit operation of the properties in question on the endowment fund.

The underlying reason for objectants' persistent efforts to block the sale of these properties still remains objectants' perceptions that the sale, as well as the effects of the consolidation of St. George's Parish

with Calvary and Holy Communion Parishes in 1975, will result in the dismantling of St. George's as a separate entity. This can be seen in the letter objectant Hopkins wrote to Rev. Thomas F. Pike, Rector of the Parish, on May 27, 1980, enclosing a copy of his expert's report in which he said:

> "Full restoration of operations in such an ideally located social hall [Memorial House] is bound to have positive effects on the Congregation's membership. Conversely, the sale of these properties seems to be the culmination of a major effort to liquidate St. George's Church, its Congregation and all that they have stood for in New York City for over two hundred years. The adamant refusal, during the last four (4) years, to reestablish its Sunday School, is merely another facet of that liquidation effort." (See opposing affidavit of Robert D. Schumacker, sworn to June 25, 1980, to which above letter is appended).

In the face of the economic realities of the times in which we live and the unanimity of the ecclesiastic and lay leaders of the Church in support of the sale as necessary and in the best interests of petitioner, this court will not disturb its original determination. Indeed, it is doubtful that the result would have been any different had objectants submitted their expert's report originally.

DATED: July 8th, 1980

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J.S.C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 18, 1980

Present--Hon. Joseph P. Sullivan,
Justice Presiding
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman
John Carro, Justices.

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The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioners-Respondents,

For leave to sell certain of its real property,

9301

Stephen Hopkins and Douglas D. Donald,

Objectants-Appellants,

Attorney General of the State of New York,

Respondent.

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An appeal having been taken in this

Court by the objectants-appellants from an order of the Supreme Court, New York County (Ascione, J.), entered on July 9, 1980, which denied the objectants' motion to vacate a judgment of November 13, 1979, granting petitioners-respondents' petition to sell two properties in New York City and reformed the deeds of those properties to permit the sale, and said appeal having been argued by Mr. Michael S. Gruen of counsel for the appellants, by Mr. Robert E. Kushner of counsel for the petitioners-respondents, and by Mr. Bernard Toomin of counsel for respondent, Attorney General; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Petitioners-respondents shall recover of objectants-appellants $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI

Clerk.